

**Law Enforcement Advisory Board**  
**Report to the Senate and House Committees on Judiciary**  
**Implementation Plan for Act No. 193, Sec. 4, 13 VSA 5581**  
**(Electronic Recording of a Custodial Interrogation)**

**October, 2014**

Act No. 193 requires the Vermont Law Enforcement Advisory Board (LEAB) to develop an implementation plan on the following:

*§ 5581. ELECTRONIC RECORDING OF A CUSTODIAL INTERROGATION*

*(a) As used in this section: (1) “Custodial interrogation” means any interrogation:*

*(A) involving questioning by a law enforcement officer that is reasonably likely to elicit an incriminating response from the subject; and (B) in which a reasonable person in the subject’s position would consider himself or herself to be in custody, starting from the moment a person should have been advised of his or her Miranda rights and ending when the questioning has concluded.*

*(2) “Electronic recording” or “electronically recorded” means an audio and visual recording that is an authentic, accurate, unaltered record of a custodial interrogation, or if law enforcement does not have the current capacity to create a visual recording, an audio recording of the interrogation*

*(3) “Place of detention” means a building or a police station that is a place of operation for the State police, a municipal police department, county sheriff department, or other law enforcement agency that is owned or operated by a law enforcement agency at which persons are or may be questioned in connection with criminal offenses or detained temporarily in connection with criminal charges pending a potential arrest or citation.*

*(4) “Statement” means an oral, written, sign language, or nonverbal communication.*

*(b)(1) A custodial interrogation that occurs in a place of detention concerning the investigation of a felony violation of chapter 53 (homicide) or 72 (sexual assault) of this title shall be electronically recorded in its entirety.*

*(2) In consideration of best practices, law enforcement shall strive to record simultaneously both the interrogator and the person being interrogated.*

*(c)(1) The following are exceptions to the recording requirement in subsection (b) of this section:*

*(A) exigent circumstances;*

*(B) a person's refusal to be electronically recorded;*

*(C) interrogations conducted by other jurisdictions;*

*(D) a reasonable belief that the person being interrogated did not commit a felony violation of chapter 53 (homicide) or 72 (sexual assault) of this title and, therefore, an electronic recording of the interrogation;*

*(E) the safety of a person or protection of his or her identity; and*

*(F) equipment malfunction.*

*(2) If law enforcement does not make an electronic recording of a custodial interrogation as required by this section, the prosecution shall prove by a preponderance of the evidence that one of the exceptions identified in subdivision (1) of this subsection applies. If the prosecution does not meet the burden of proof, the evidence is still admissible, but the Court shall provide cautionary instructions to the jury regarding the failure to record the interrogation.*

### **Implementation Plan**

It's been a long-standing practice of the LEAB to develop and recommend statewide model policies for law enforcement agencies on various topics, as well as identify essential components that an agency's policy should contain. This practice allows agencies to either adopt the LEAB policy or modify existing policies to ensure they contain the essential components. With regards to Act. 193, the LEAB will follow the same process.

- 1.) 13 VSA 5581 contains very specific requirements for law enforcement agencies regarding the recording of custodial interrogations, as noted above. Though some agencies in VT are already recording interviews and have policies addressing this, there is no one model policy available to agencies

that either don't currently record interviews but will in the near future, or that contains the essential components as laid out in statute.

- 2.) The LEAB has partnered with Project Innocence to review policies from around the state and those supplied by Project Innocence in order to identify best practices and incorporate the language in 13 VSA 5581, and then create a statewide model policy that agencies can adopt or use to compare to the language and procedures in their own policies.
- 3.) The LEAB goal is to have this model policy available for agencies by January 1, 2015, the same date that agencies have to adopt an eyewitness identification policy.
- 4.) The LEAB has conducted a survey of current recording equipment possessed and used by VT law enforcement agencies, and will develop recommendations on how to assist law enforcement agencies seeking to equip their facilities.

Respectfully submitted,

Richard B. Gauthier, Chair

Vermont Law Enforcement Advisory Board